NOS. 15603 - 15604

United States
COURT OF APPEALS
for the Ninth Circuit

CONVERSE TRUCKING SERVICE, a Corporation and DONALD H. NOTEBOOM, *Appellants,*

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO., a Corporation, *Appellee.*

15603

SAMACK, INC., a Corporation, *Appellant,*

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO., a Corporation, *Appellee.*

15604

BRIEF FOR APPELLANTS

Appeal from the United States District Court for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

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JURISDICTION

This is a combined appeal from companion judgments in two civil actions arising out of the same accident. These actions were commenced in the United States District Court for the District of Oregon by the appellant, Converse Trucking Service, a Corporation (15603) and by Samack, Inc., a Corporation (15604). Donald H.

Noteboom was brought into the first case on motion of the appellee as a third party defendant and sought relief as a counterclaimant. Pacific Intermountain Express Co., sought affirmative relief against Noteboom, Converse Trucking Service, and Samack, Inc., for its property damage.

Converse Trucking Service is a California corporation. Donald H. Noteboom and Samack, Inc., are residents of Oregon, and Pacific Intermountain Express Co., is a Nevada corporation. The amount in controversy, exclusive of interest and costs in each case, exceeds the sum of $3,000.00.

The District Court had jurisdiction under the provisions of 28 U.S.C.A. Sec. 1332 (a), and the Consolidated Pre-Trial Order (Tr. 3-11, especially Tr. 4).

In addition to the parties above named and by virtue of claimed subrogation rights, the Home Insurance Company, a New York corporation, and the Phoenix Insurance Company, a Connecticut corporation, were joined as parties plaintiff-intervenors in 15604. Neither intervenor has filed notice of appeal.

The cases were consolidated for trial before a jury and a judgment was entered in each case in favor of Pacific Intermountain Express Company by virtue of acceptance of answers to specific interrogatories made by the jury, said judgment orders being entered on the 27th day of March, 1957.

STATEMENT OF THE CASE

Facts

The within several causes of action arise out of a collision which occurred in the State of Oregon on Highway No. 58 near Crescent Lake Junction in the Cascade Mountains on the 7th day of March, 1956. At this time a truck owned by Samack, Inc. and under lease to Converse Trucking Service (hereinafter called Converse), was being operated by an agent and employee of Converse Trucking Service, Donald H. Noteboom, said truck proceeding in a general southeasterly direction enroute from Portland, Oregon, to Klamath Falls, Oregon. The tractor part of the truck assembly, the item owned by Samack, Inc., and leased to Converse, was jointly insured for collision by the intervenors, the Home Insurance Company and the Phoenix Insurance Company (Tr. 4-5).

At the same time a truck owned by Pacific Intermountain Express Co. (hereinafter called P.I.E.), was being operated generally northeasterly on the same road enroute from Klamath Falls, Oregon, to Portland, Oregon, and this truck was being driven by Sherman E. Clancy, an agent and employee of P.I.E. (Tr. 4-5, Tr. 149-150).

As a result of the collision between the motor vehicles, the tractor of Samack, Inc. and the trailers owned by Converse Trucking Service sustained some damage, as did the tank truck and trailer owned by P.I.E., which

damage in the last instance was agreed upon as being the sum of $1,501.52 (Tr. 4-5, 8-9).

In addition to the property damage as herein mentioned Donald H. Noteboom sustained serious personal injuries (Tr. 5).

Intervening plaintiffs, Home Insurance Company and Phoenix Insurance Company, each insured Samack, Inc. for 50% against collision or upset damages in excess of $1,000.00 to the tractor being operated for Converse Trucking Service. Following said collision each intervening plaintiff loaned Samack, Inc. the sum of $2,384.73 upon a loan agreement of Samack, Inc. to repay the said sum in the event of recovery against third parties (Tr. 5).

The accident occurred on the 7th day of March, 1956, at about 1:30 A.M. (Tr. 27), on a highway described as the Willamette Pass which traverses the Cascade Mountains in northern Klamath County, Oregon. At that particular point of the impact, the highway was covered with packed snow and bordered by snow banks approximately 23 feet, 8 inches apart (Tr. 58). Both vehicles were eight feet wide (Tr. 59) (Exhibits 3-A, 3-B, 3-C, 3-E, 3-F, Tr. 43-45, Exhibits 23-A to L, inclusive, Tr. 162). The point of impact is located in the middle of a straight stretch of highway which extends for approximately one-half mile and is slightly downgrade for vehicles travelling from Portland to Klamath Falls, the southeasterly direction (Tr. 28, 151).

The Converse rig consisted of a tractor and a set of doubles, or two van-type trailers (Exhibit 3-B) (Tr.

256-26). The Pacific Intermountain equipment consisted of a tank truck and tank trailer (Tr. 149, Exhibit 23-G, Exhibit 3-A), and was being operated without any cargo load (Tr. 155).

Each driver was alone at the time of the occurrence and there were no direct eye witnesses to the actual impact. The P.I.E. truck was being followed by witness Roy Burton, who saw the vehicles approach each other ahead of him and recalled that both vehicles were on their respective right sides of the road (Tr. 96), but after seeing the P.I.E. rig sway slightly, everything went black and he was unable to see the actual impact.

It is of prime importance to note the area of damage on each truck unit. In the case of the Converse equipment, the left front of the cab was badly damaged (Exhibits 3-B, 10-B, Special Jury Finding No. 4, Tr. 14). As can be seen by the picture exhibits, there was additional damage to the trailers, the parts of the equipment actually owned by Converse, and which P.I.E. stipulated was the sum of $2,026.68 (Tr. 101). No damage was apparent to the front part of the P.I.E. equipment, the damage being limited to the area of the trailer hitch.

It was the contention of each driver that the other crossed the center line, causing the accident. Noteboom, the Converse driver, stated that the passage between the snow banks was wide enough for the two vehicles and he was on the right hand side of the road almost touching the snow bank (Tr. 29). He further stated that the oncoming P.I.E. truck was on its own side and

that both vehicles were travelling about 35 miles per hour (Tr. 30). As the vehicles approached, he is of the opinion that the other vehicle hooked into the snow, or something, and that following this, the back end of the tanker came across and struck the left front of the Converse tractor (Tr. 30-31).

Sherman Clancy, the P.I.E. driver, stated that as the vehicles approached he was travelling approximately 32 miles per hour (Tr. 150) and that the Converse equipment was travelling approximately 45 miles per hour (Tr. 151). He had seen the oncoming vehicle for approximately one-half mile and during this period of time he maintained his tanker on the right side of the highway. His recollection was that as the vehicles were approximately 50 to 75 feet apart, the Converse rig appeared to be coming toward him, that he pulled to the right as far as possible, that the tractor of the Converse equipment passed his cab and the collision occurred (Tr. 151-2).

It will be seen from the instructions that the matters submitted to the jury consisted of the question of negligence on the part of either or both of the drivers, the question of damages personally suffered by Donald H. Noteboom and the damages suffered by Samack, Inc., the lessor of the Converse tractor. The matters concerning the damages sustained by the intervenors, Converse, and P.I.E., were covered either by the Pre-trial Order or stipulation during the course of trial. Judgments were entered in favor of P.I.E. in each case but without allowance of the counterclaim, based upon the answers

to the special interrogatories made by the jury (Tr. 13). Essentially, the jury found that neither driver was guilty of negligence. Because of this peculiar situation, a motion for an order setting aside the judgment and the findings of the jury with respect to the consideration of negligence was made by all of the plaintiff-claimants, which was denied by the trial court.

The appellants contend that the jury could not have found that neither driver was guilty of negligence, as will be shown more fully hereinafter because of the applicable law and the occurrences during the trial. Therefore, in each instance, the appellants respectfully ask that the judgments entered upon the inconsistent and erroneous findings be set aside, and that the appellants have a new trial on the issue of negligence and liability.

SPECIFICATION OF ERROR

The error urged by each of the appellants herein is that the trial court should not have accepted the answers submitted by the jury and should have ordered a new trial as to the question of negligence *because under the circumstances one of the drivers had to be negligent, or else the accident would not and could not have happened.* It should be noted that no re-trial has been asked on the question of damages and it is the position of the appellants that this matter need not be re-tried, being a separate and severable matter from the question of liability and that the damages found by the jury and the stipulation of damages entered into were reasonable and proper under all of the circumstances.

ARGUMENT

Summary of Argument

1. Under the Statutes of the State of Oregon, the substantive law governing the trial, both drivers were charged with the statutory duty of yielding at least one-half of the main traveled portion of the highway in question to the other.

Gum v. Wooge (1957), 65 Or. Adv. Sh. 57, 63, — Ore. —, 315 P.2d 119;
LaVigne v. Portland Traction Co. (1946), 179 Ore. 221, 170 P.2d 709;
Austin v. Portland Traction Co. (1947), 181 Ore. 470, 182 P.2d 412;
Wilson v. Bittner (1929), 129 Ore. 122, 276 P.2d 268;
ORS 483.302;
ORS 483. 306.

2. Inconsistent special findings by a jury cancel and destroy each other and cannot be the basis for a judgment, but require a new trial.

Golden North Airways v. Tanana Publishing Co. (CA-9 1955), 218 Fed. 2d 612;
Mounger v. Wells (CCA-5 1929), 30 Fed. 2d 521;
Huling v. Seccombe (1928), 88 Cal. App. 238, 263 Pac. 362;
McGuire v. McGuire (1940), 152 Kans. 237, 103 P.2d 884;
Willis v. Skinner (1913), 89 Kans. 145, 130 P. 673;
Packer v. Fairmount Creamery Co. (1944), 158 Kans. 191, 146 P.2d 401.
King v. Vets Cab (1956), 179 Kans. 379, 295 P.2d 605.

3. Where error requires reversal and a new trial on one severable issue, retrial may be had on that one par-

ticular point without re-trying other issues as to which no error exists.

Gasoline Products Company v. Champlin Co. (1931), 283 U.S. 494, 51 S. Ct. 513, 75 L. Ed. 1188;

Atkinson v. Dixie - Greyhound Lines (CCA-5 1944), 143 Fed. 2d 477, Cert. Den. 323 U.S. 758, 65 S. Ct. 92, 89 L. Ed. 607;

Ecker v. Potts (CA-DC 1940), 112 F.2d 581, 72 App. D.C. 174;

U. S. v. Calvey (CCA-3 1940), 110 F.2d 327.

SPECIFICATION OF ERROR

The trial court erred in accepting the special findings and entering judgment thereon and in failing to set aside the judgments and order a new trial upon motion timely made.

ARGUMENT

It has been the contention throughout this matter, that the Answers returned by the jury were inconsistent in two particulars as follows:

"We, the jury, answer the special interrogatories as follows:

1. (a) Was Sherman E. Clancey, the driver of the Pacific Intermountain Express Co. truck and trailer, guilty of negligence?

No.

(b) Was Donald H. Noteboom guilty of negligence which caused or contributed to the accident?

No.

2. (a) Was Donald H. Noteboom, the driver of Converse Trucking Service truck and trailer, guilty of negligence?

No.

(b) Was Sherman E. Clancey guilty of negligence which caused or contributed to the accident? No. . . . . ." (Tr. 13).

The inconsistency of the foregoing is based upon the fact that *one or both* of the drivers had to be negligent for the accident to have occurred.

ORS 483.302 and 483.306 are the applicable statutes. The former provides:

"DUTY TO DRIVE ON RIGHT HALF OF THE HIGHWAY. (1) Upon all highways of sufficient width, other than one-way highways, the driver of a vehicle shall drive on the right half of the highway except when:

"(a) The right half is out of repair and for that reason is impassable; or

"(b) Overtaking and passing another vehicle in accordance with ORS 483.308.

"(2) In driving upon the right half of a highway the driver shall drive as close as practicable to the right-hand edge or curb of the highway except when;

"(a) Overtaking or passing another vehicle;

"(b) Placing a vehicle in position to make a left turn; or

"(c) There are two or more clearly marked lanes allocated exclusively to traffic moving in the direction the vehicle is proceeding."

ORS 483.306 provides:

"PASSING VEHICLES PROCEEDING IN OPPOSITE DIRECTION. Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main traveled portion of the roadway as nearly as possible."

The Supreme Court of the State of Oregon in construing the foregoing statutes, has held that strict compliance is not demanded except when vehicles are approaching from opposite directions. In the recent case of Gum v. Wooge (1957, 65 Or. Adv. Sh. 57, 63, — Ore. —, 315 P.2d 119, the Court said, in commenting upon the foregoing statutes:

> "The requirement of keeping to the right half is not absolute under all circumstances and does not contemplate undeviating compliance except when drivers meet, and pass vehicles coming from the opposite direction. Austin v. Portland Traction Co., 181 Or. 470, 182 P2d 412. Furthermore, the statute is not considered violated in instances when the driver, acting as a reasonably prudent person, turns to the left to avoid a collision with an approaching vehicle traveling in its wrong lane. La Vigne v. Portland Traction Co., 179 Or. 221, 170 P2d 709. Violation of the statutes is negligence per se. Wilson v. Bittner, 129 Or. 122, 276 P. 268."

In the present case, the jury was instructed in effect that they were to pass upon the question of where the point of impact was located in determining which of the drivers was negligent. The jury was also instructed that under the evidence it would not be negligence on the part of Clancey, the P.I.E. driver, to be over the center, if he were confronted with an emergency. The emergency, of course, would be the oncoming Converse truck being itself over the center line (Tr. 152). However, were that the case, then Noteboom himself would have been guilty of negligence and this jury should have so found.

Reducing it to its simplest terms, the situation is

simply that with 23 feet, 8 inches clearing between the snow banks (Tr. 58, 74) and with trucks of eight foot width (Tr. 59), one or both of the operators had to drive their vehicles across the center line in order for the accident to take place. One of the peculiar circumstances in the present case is that proximate cause was withdrawn from the jury in the following conversation between Court and counsel:

> "The Court: Then you don't want to know the proximate cause?
>
> Mr. Gearin: No, sir, I don't think so.
>
> The Court: Proximate cause is obvious, it seems to me.
>
> Mr. Vergeer: That's right, your Honor.
>
> The Court: We will cut out proximate cause. It's admitted that if the one party was on the wrong side of the road, and the accident occurred, it was the proximate cause as a matter of law. . . . ." (Tr. 180)

No exception was taken to the giving of this instruction.

It might be argued in opposition to this proposition that either or both sides had failed to carry the burden of proof, but we submit that this is simply not the situation. In the present case the jury made affirmative findings that neither driver was negligent. This is not a situation wherein the jury is unable to make an affirmative finding and leaves the answer to the question blank. Had this occurred, then it would have been apparent that one or both sides had failed to carry their respective burdens of proof.

Based upon the premise as above outlined that the accident could not physically have occurred had not one of the parties been over the center line immediately prior

to the accident and thus had been negligent per se, the appellants contend that it was thus error for the Trial Court to enter judgment upon such inconsistent findings.

Rule 49 of the Federal Rules of Civil Procedure in subsection (a), provides for the special verdict and interrogatory form as was used in the present case. No complaint is made by the appellants as to submitting special questions to the jury. It is the position of the appellants that the error was committed in accepting the Answers as returned by the verdict.

The general rule that the inconsistent special findings cancel and destroy each other, is supported by the following cases:

Willis v. Skinner (1913), 89 Kans. 145, 130 P. 673;

McGuire v. McGuire (1940), 152 Kans. 237, 103 P.2d 884;

Packer v. Fairmount Creamery Co. (1944), 158 Kans. 191, 146 P.2d 401;

King v. Vets Cab (1956), 179 Kans. 379, 295 P.2d 605;

Huling v. Seccombe (1928), 88 Cal. App. 238, 263 P. 362.

Support for this proposition is found in the case of Packer v. Fairmount Creamery Co., supra, which is a case arising out of a factual situation similar to that of the present case. In the Packer case, the collision occurred between two vehicles on a narrow bridge and inconsistent findings were returned by the jury inasmuch as they found against the defendant on the question of failure to apply brakes and then found that the accident

would not have happened if the plaintiff's vehicle had been on the right side of the bridge.

In support of this order requiring a new trial, the Court quoted from the case of Willis v. Skinner, supra, stating:

> " 'Consistent special findings control the general verdict when contrary thereto; but when they are inconsistent with one another, some showing a right to a verdict, and others showing contrary, the case is left in the condition of being really undecided, and a new trial should be granted'. (Syl)."

This language has been most recently approved in the case of King v. Vets Cab, supra.

Another Kansas case cited is that of McGuire v. McGuire, supra, wherein a verdict for plaintiff, injured when she slipped on rugs in the home of the defendant, was set aside and a new trial granted because of inconsistent special findings. In that particular case the findings determined to have been inconsistent were as follows:

> "8. Were the injuries received by the plaintiff, Mrs. Effa H. McGuire, the result of an unavoidable accident? Yes.
>
> "9. Was the defendant Ruth McGuire guilty of negligence which caused the injuries which were received by the plaintiff, Mrs. F. H. McGuire. Yes."

Following the general rule above noted is Huling v. Seccombe, supra, a case decided in California by the District Court of Appeals.

The question has not often been raised in the Fed-

eral Courts, but the problem was passed upon squarely in the case of Mounger v. Wells (CCA-5 1929), 30 F.2d 521. In this case, a series of special findings were submitted and the Circuit Court held that inasmuch as two of the findings were absolutely in direct opposition to each other, a judgment entered thereupon could not be sustained and a new trial was ordered.

The Court said in its opinion, on page 521:

> "It is evident that the answers above set out are irreconcilable. If no actual delivery of cotton was intended to be made, the transaction would be classed as gambling, and recovery could not be had under the law of Texas. On Question No. 2, the contrary result would be reached, for the rules and methods prescribed by the New Orleans Cotton Exchange contemplates actual delivery if the parties did not settle their transactions, otherwise before the delivery date, and the transaction would be legal."

This Court, in the recent case of Golden Northern Airways v. Tanana Publishing Co., 218 F.2d 612, 618, upheld the general rule that special findings control general findings. Such a principle is not applicable as in the present case when two sets of special findings are in conflict. However, in the special concurring opinion, the case of Mounger v. Wells, supra, was cited by Circuit Judge Pope, wherein he stated:

> " . . . . . Even if some inconsistency could be found between the answers to No. 1 and No. 7, the only result would be to require a new trial, Mounger v. Wells, 30 F.2nd 521 . . . . ."

It should be noted that the ultimate decision in the Golden Northern Airways case, supra, was decided on other grounds, relating to the question of whether or not a libel was legally proved.

It is apparent in the present case that the questions of damages and the question of liability are entirely severable and are not in any sense overlapping. The damages sustained by Converse Trucking Service and P.I.E. were stipulated (Tr. 9, 101), while the claim of the intervening plaintiffs was not disputed (Tr. 186). This left only the question of actual damages sustained by the lessor of the Converse tractor, Samack, Inc., and the personal injuries sustained by the Converse driver, Donald H. Noteboom. These respective items were proven entirely independently of any question of liability, to which, of course, they were not related.

While it would appear discretionary with the appellate court in reversing as to whether direction should be given to re-try only on certain issues, it would appear that such an order in the present case would serve to expedite a trial and disposal of this matter. The rule is clearly borne out in the following cases:

Gasoline Products Company v. Champlin Co. (1931), 283 U.S. 494, 51 S. Ct. 513, 75 L. Ed. 1188;

Atkinson v. Dixie - Greyhound Lines (CCA-5 1944), 143 F.2d 477, Cert. Den. 323 U.S. 758, 65 S. Ct. 92, 89 L. Ed. 607;

Ecker v. Potts (CA-DC 1940), 112 F.2d 581, 72 App. D.C. 174;

U. S. v. Calvey (CCA-3 1940), 110 F.2d 327.

SUMMATION

Appellants submit that the record herein requires a new trial on the question of liability and urge this Court to issue such a mandate to the trial court.

Respectfully submitted,

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